UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

SHAW SPRAGUE,	***)***	
	)	
Plaintiff and Counterclaim Defendant	***)***	
	)	
v.	***)***	***Docket No. 97-258-P-C***
	)	
JEANETTE SPRAGUE HAGEN, et al.,	***)***	
	)	
Defendants and Counterclaimants	***)***	
	)	
v.	***)***	
	)	
JULIE SPRAGUE, et al.,	***)***	
	)	
Counterclaim Defendants	***)***	

RECOMMENDED DECISION ON DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND COUNTERCLAIM DEFENDANT'S MOTION FOR SEPARATION AND TO DISMISS

In this action involving construction of a trust established by the father of the plaintiff and one of the defendants, the defendants seek partial summary judgment on certain claims raised against them in the amended complaint and on certain portions of their counterclaim. Counterclaim-defendant Julie Sprague, the third child of the settlor, seeks an order setting apart to her a one-third interest in the corpus of the trust and dismissing her from this action. I recommend that the court

grant the defendants' motion and deny the motion filed by Julie Sprague.[1]

I. Applicable Legal Standards

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Ass'n of Machinists & Aerospace Workers v.*

[1] The plaintiff has requested oral argument on the motion for partial summary judgment. Docket No. 45. Because I am satisfied that the written submissions of the parties are sufficient to permit the court to resolve the issues raised therein, the request for oral argument is denied.

Winship Green Nursing Ctr., 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

Julie Sprague's motion does not identify the legal authority under which she seeks dismissal. Because she appears to seek dismissal only in the event that her request for division of the trust assets is granted, only Fed R. Civ. P. 12(b)(6) seems to provide a basis for the dismissal that she seeks. "When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending the plaintiff every reasonable inference in his favor." *Pihl v. Massachusetts Dep't of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993). The defendant is entitled to dismissal for failure to state a claim "only if it clearly appears, according to the facts alleged, that the plaintiff cannot recover on any viable theory." *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 52 (1st Cir. 1990); *see also Jackson v. Faber*, 834 F. Supp. 471, 473 (D. Me. 1993).

II. Factual Background

The following facts are appropriately set forth in the summary judgment record and are not disputed by the parties. Defendants Alan Lindsay and Jeanette Sprague Hagen are co-trustees of the P. Shaw Sprague Trust —1962 ("the 1962 Trust"), having been appointed in October 1994. Affidavit of Alan Lindsay ("Lindsay Aff."), Exh. B to Statement of Material Facts in Support of Defendants [sic] Motion for Partial Summary Judgment ("Defendants' SMF") (Docket No. 29), ¶ 1; Affidavit of Jeanette Hagen ("Hagen Aff."), Exh. A to Defendants' SMF, ¶ 1. The trust was established by P. Shaw Sprague, father of Shaw Sprague, the plaintiff, defendant Jeanette Sprague Hagen, and counterclaim-defendant Julie Sprague. The P. Shaw Sprague Trust — 1962 ("the Trust Document"), Exh. D to Defendants' SMF; Lindsay Aff. ¶ 3. These three siblings are also the children of Jeannette Hume Sprague, the second wife of P. Shaw Sprague. Lindsay Aff. ¶ 3. The

1962 Trust holds 50% of the shares in the Black Point Corporation, which in turn holds all of the shares of the Sprague Corporation, the successor-in-interest to C. H. Sprague & Son Company. *Id.* ¶ 4; Hagen Aff. ¶ 6. The Sprague Corporation holds between 2200 and 2500 acres of real property in Cape Elizabeth and Scarborough, Maine. Hagen Aff. ¶ 6; Report to Preston H. Saunders, Esq. & John Mechem, Esq., Trustees on Sprague Corp. Land Holdings Cape Elizabeth & Scarborough, Maine Phase II (1/12/81), Exh. A to Affidavit of Evans Huber ("Huber Aff.") (Docket No. 34), at [1] (JH 0930).

P. Shaw Sprague, some years after establishing the 1962 Trust, executed a Memorandum of Intentions concerning, *inter alia*, the 1962 Trust. Memorandum of Intentions, Exh. E to Defendants' SMF. The defendants regard this memorandum as a statement of the intent of the settlor and have relied upon it as a guide in making decisions as trustees. Hagen Aff. ¶¶ 8, 10; Lindsay Aff. ¶¶ 7, 9. The Sprague Corporation is preparing a plan for limited development of the so-called "core" properties it holds, which are located in Cape Elizabeth. Hagen Aff. ¶ 7. The defendants do not currently favor a plan that would seek to maximize the present income potential of the "core" properties. Hagen Aff. ¶ 10; Lindsay Aff. ¶ 9. In February 1981, the 1962 Trust entered into a stockholders agreement with all of the other stockholders of the Black Point Corporation, to which the Black Point Corporation and the Sprague Corporation are also parties. Exh. D to Huber Aff. This agreement provides, *inter alia*, that leases of Sprague Corporation property may be granted only to Black Point Corporation stockholders, that such leased property may be used only for certain purposes, and that the leased property may not be subleased to persons outside the Sprague family for terms exceeding one year. *Id.* at 3-5.

Much of the income of the Sprague Corporation comes from a trust known as the 1920 Trust,

which was established by the father of P. Shaw Sprague. Deposition of Jeanette S. Hagen (1/29/98), excerpts attached as Exh. B to Huber Aff., at 37; The Sprague Corporation Five Year Plan (sealed), Exh. L to Huber Aff., at 9; Memorandum of Intentions at 1. The three children of P. Shaw Sprague's first marriage, Phineas Sprague, Millicent S. Monks and Lucy Sprague Foster, own the remaining shares in the Black Point Corporation. Memorandum of Intentions at 5. The plaintiff, Shaw Sprague, was recently advised by the Sprague Corporation that he would be required to pay for his share of certain land use planning costs incurred by the corporation. Exh. E to Huber Aff.

III. Discussion

A. The Motion for Partial Summary Judgment

The defendants' motion is very limited in scope. They seek summary judgment only on the allegations in the amended complaint that the defendants violated their fiduciary duty to the plaintiff by "[c]ausing and/or permitting the Sprague Corporation to pursue plans to devalue its own assets," First Amended Complaint (Docket No. 6) at ¶¶ 78(c), 83(c); and those portions of their counterclaim seeking a declaratory judgment that, as trustees of the 1962 Trust, they are "authorized to consider the intentions of the trustor, as expressed in his Memorandum of Intentions, to preserve the core lands of the Sprague Corporation for residential and recreational use by Sprague family members, and are not required to take actions calculated to exploit the commercial potential of such property," Defendants' Answer, Defenses and Counterclaim (Docket No. 2) ¶ 17(a), and that they "are not required to exercise their discretion under the trust to maximize the present income of the trust or distribute such income to the current income beneficiaries," *id*. ¶ 17(c).

For the purpose of their motion, the defendants do not dispute that they could use their

powers as holders of 50% of the stock in the Black Point Corporation to stop the Sprague Corporation from pursuing plans for the core properties that would not result in maximizing the income-producing potential of those properties. Defendants' Memorandum in Support of Motion for Partial Summary Judgment ("Defendants' Memorandum") (Docket No. 28) at 4. This assumption is a necessary predicate to the plaintiff's claim that the defendants breached their fiduciary duty by "allowing" the Sprague Corporation to "devalue its own property."

The trust document provides that the trust shall be governed by Massachusetts law. Trust Document at P0330.[2] Under Massachusetts law,

> [t]he fundamental object in the construction of a [trust] is to ascertain the . . . [donor's] intention from the whole instrument, attributing due weight to all of its language, considered in light of the circumstances known to the . . . [donor] at the time of its execution, and to give effect to that intent unless some positive rule of law forbids. If a will is not ambiguous, extrinsic evidence to explain its terms is inadmissible, even where the language involved has a legal consequence either not likely to have been understood by the . . . [donor] or contrary to his intention expressed orally. If, however, there is an ambiguity in a will, such as a conflict of terms, extrinsic evidence may be resorted to in order to show the circumstances known to the . . . [donor] under which he viewed that ambiguous language.

Upham v. Siskind, 453 N.E.2d 1065, 1069 (Mass. App. 1983) (citations omitted), quoting *Putnam v. Putnam*, 316 N.E.2d 729, 734 (Mass. 1974). The same standard is applied to a trust instrument. *Id. See also* IIA A. Scott & W. Fratcher, *The Law of Trusts* ("Scott & Fratcher") § 164.1 (4th ed. 1987).

> [W]here a trust is to provide income to beneficiaries for a term of years and then the trust property is to be distributed to remaindermen, the trustees are under a duty to sell the trust property when it becomes unproductive "in the

[2] The pages of the Trust Document bear numbers that appear to have been added at some time after the document was executed. I will refer to these Bates-stamp-like numbers in citations to the document, which does not bear any other page numbers on the copy provided to the court.

> absence of manifestation of intent on the part of the testator or settlor that the property be retained even if it becomes unproductive."

Rutanen v. Ballard, 678 N.E.2d 133, 138 (Mass. 1997), quoting *Springfield Safe Deposit & Trust Co. v. Wade*, 24 N.E.2d 764 (Mass. 1940).

> The trustee is not of course under a duty to sell unproductive property if he is directed or authorized by the terms of the trust to retain it.
>
> * * *
>
> A general authorization to the trustee to retain trust property included in the trust at the time of its creation does not necessarily empower him to retain unproductive property. It is a question of interpretation of the instrument in the light of all the circumstances whether such an authorization permits the trustee to retain investments without regard to the ordinary requirement that the trust property should be so invested as to yield a fair income. . . . Thus where the property is specifically mentioned in the trust instrument, and particularly where it constitutes the whole of the trust estate, and where it is known to the settlor to be unproductive property at the time of the creation of the trust, the trustee is presumably under no duty to sell it.

Scott & Fratcher § 240.1.

The trust instrument at issue here provides, in relevant part, that the trustees may pay any part of the trust income or principal to Jeannette Hume Sprague, then the wife of the donor, and to the issue of their marriage, "in their uncontrolled discretion," provided that payments of principal to Jeannette not exceed $20,000 per year, Trust Document at P0323-0324, and that upon termination of the trust the principal is to be distributed *per stirpes* to the then living issue of the marriage of the donor to his wife Jeannette, *id*. at P0324.

> [T]he trustees shall have and may exercise at any time and from time to time, without liability for the exercise or non-exercise of the same and without further notice to anyone, the following powers, authorities and discretions without license of court or consent of beneficiaries and notwithstanding any contrary laws or customs prevailing from time to time:
>
> To retain indefinitely and invest in any property, real or personal,

> regardless of its character, quality and the principles of diversification or any other principles usually applicable to investments of fiduciaries, including without limitation, any and all property received by them from the Donor or anyone else and any shares, participations or other interests in a common trust fund, and any stock or other securities or obligations of C. H. Sprague & Son Company, a Delaware corporation, or of any corporation or business organization which the Trustees determine to be a subsidiary, parent, affiliate or successor to the whole or any part of the business of C. H. Sprague & Son Company; to hold principal uninvested or in unproductive property; . . . to determine conclusively, regardless of prevailing probate or other accounting practices, what constitutes income and principal and the charges to be made against each; . . . .

Id. at P0325-[unnumbered]. The trust instrument does not refer specifically to any trust property or principal other than the original one hundred dollars transferred by P. Shaw Sprague to the trust upon its creation. *Id*. at P0323. Jeannette Hume Sprague is apparently no longer living.

The defendants argue that the trust instrument "expressly authorized the holding of Sprague Corporation stock and unproductive property," Defendants' Memorandum in Support of Motion for Summary Judgment ("Defendants' Memorandum") (Docket No. 28) at 6, that the "Sprague Corporation's property is in the same relatively non-income producing state as it was in 1962," *id*. at 7, and that the trust instrument does not obligate the trustees to distribute any income, *id*., all of which compel the conclusion that the trustees have the power to hold property that does not produce income, presumably the shares in the Black Point Corporation that are the only property demonstrated by the summary judgment record to be owned by the 1962 Trust. The 1962 Trust does not appear to hold any stock in the Sprague Corporation.

There appears to be no dispute among the parties that there is a need to develop the non-core properties held by the Sprague Corporation to support the retention of the core properties and to provide some income, if possible, to the issue of P. Shaw Sprague and Jeannette Hume Sprague.

The plaintiff's primary complaint against the defendant trustees is that they have not moved quickly enough since their appointment in 1994 to do so and thereby have breached their fiduciary duty to him and to other beneficiaries. Plaintiff's Opposition to Defendants' Motion for Partial Summary Judgment (Docket No. 32) at 16 ("The question presented here is whether these Defendants are protected from liability . . . for continuing the unproductive use of all of the 'Sprague Corporation property' including the non-core property." (Emphasis in original.)) The defendants respond that the delay in development of these properties was due to uncertainty over the income available from the 1920 Trust which provides most of the income for the 1962 Trust, a delay due solely to the plaintiff's action as the only objector to a settlement of a dispute regarding the use of income from that trust in the Massachusetts courts. That reason, however, is essentially irrelevant to the dispute presented here by the motion for partial summary judgment.

The defendants seek to limit this court's ruling on their pending motion to their duties with regard to the core properties, but those provisions of the amended complaint addressed by the motion are not so limited, nor is one of the two subparagraphs of their counterclaim included in their motion. This court must address those allegations as they are written.

Initially, I conclude that the trust document is not ambiguous with respect to the terms at issue in this proceeding. The words of the terms at issue are clear. The only disputed question is the appropriate application of those words to the factual situation currently presented. Under these circumstances, the court may not resort to extrinsic sources for assistance in determining the intent of the grantor. *Upham*, 453 N.E.2d at 1069. Thus, the statement of intention signed by the settlor after the 1962 Trust came into existence cannot control the interpretation of the trust document. However, this fact does not prevent the trustees from referring to the statement of intention for

guidance,[3] so long as their actions in reliance on the statement of intention do not violate the terms of the trust. *See* C*lymer v. Mayo*, 473 N.E.2d 1084, 1094 (Mass. 1985) (extrinsic evidence admissible to explain language of trust even when no ambiguity present).

This conclusion leads inevitably to conclusions concerning the two subparagraphs of the defendants' counterclaim upon which they seek summary judgment. There is nothing in the language of the trust document that requires the trustees to exercise their discretion under the trust to maximize the present income of the trust or to distribute such income to the current income beneficiaries, Counterclaim ¶ 17(c), and the plaintiff does not seriously argue that they must do so. The defendants are entitled to summary judgment as to this portion of their counterclaim. Similarly, there is nothing in the language of the trust document that requires the trustees to "take actions calculated to exploit the commercial potential" of any trust property, or by extension any property controlled by virtue of ownership of the trust property, including the core property held by the Sprague Corporation that is the subject of subparagraph 17(a) of the counterclaim. There is nothing in the language of the trust document that is inconsistent with the previous holding of this court that

[3] The plaintiff insists that the statement of intentions is not reliable because it was drafted by P. Shaw Sprague's son-in-law, that it was drafted five years after the 1962 Trust was created and signed three years later, that it expressly denies the intent to impose obligations on anyone, that it is internally inconsistent, and that Sprague family members have not always acted in a manner consistent with it. Plaintiff's Opposition at 5-6. He does rely upon it to support his argument that the defendants have failed to develop the non-core property of the Sprague Corporation as quickly as they should. *Id*. at 15-17. In any event, I see no relevance to the independent actions of various family members or the identity of the draftsman, given the fact that the settlor initialed each page and signed the document, and I find that the internal inconsistencies cited by the plaintiff do not in fact exist. While it was executed after the trust document, the statement of intentions can and does express the settlor's view of conditions that existed at the time of execution of the trust document. Because the trustees seek nothing more than a declaration that they are not precluded from considering the statement of intentions, rather than being bound by it, the settlor's stated intention not to bind anyone by the document is not inconsistent with its use by the defendants.

> [t]he [Sprague] Corporation's mandate has been, from the beginning, to maintain the properties of the 2700-acre estate for the benefit of family descendants. As P. W. Sprague's son, Phineas Shaw Sprague ("P. S. Sprague"), wrote:
>
> > "Neither my father nor I have ever felt that ownership in the Cape Elizabeth . . . properties should be converted into cash. We have felt that these properties are a form of Trust or a Club to be carried on from generation to generation."

Sprague Corp. v. Sprague, 855 F. Supp. 423, 426 (D. Me.1994) (quoting from Memorandum of Intentions). Preserving the core lands for residential and recreational use by Sprague family members is not inconsistent with the terms of the trust document, so long as those lands, assuming, as the parties would have the court do for purposes of this motion, that those lands constitute by extension the value of the actual corpus of the 1962 Trust, are not lost due to actions of the trustees. As discussed more fully below, the plaintiff has failed to establish in the summary judgment record that there is any imminent danger that the Sprague Corporation will lose the core properties.

Massachusetts case law does not address the question whether, where the trust instrument, as is the case here, expressly allows the trustees to hold unproductive property, they may continue to do so when retention of such property would inevitably frustrate the intent of the trust. *But see Mazzola v. Myers*, 296 N.E.2d 481, 488 (Mass. 1973) (suggesting that a trustee is not obligated to dispose of trust assets that are not income-producing when there is a direction in the instrument creating the trust to the contrary and "there is no reason to fear for the safety of the investment"). While the plaintiff has submitted some evidence, disputed by the defendants, that the Sprague Corporation has been unable to meet its financial goals in recent years, he has offered nothing of evidentiary quality showing that the defendants, as trustees, have allowed the financial situation of the Sprague Corporation to deteriorate to the point where the 1962 Trust cannot be maintained.

Indeed, he has offered no evidence that the trustees have, in the words of the relevant allegations in his amended complaint, caused or permitted the Sprague Corporation to pursue plans to devalue its own assets. The evidence before the court establishes only that the Sprague Corporation is pursuing plans that will not result in maximizing the value of its core properties. Under Massachusetts law, such evidence cannot constitute a breach by the defendants of their fiduciary duty to the beneficiaries of the 1962 Trust. As the Massachusetts Supreme Judicial Court has said:

> This court has uniformly held that trustees in whom a discretion is vested are under an obligation to exercise a sound judgment and a reasonable and prudent discretion; that kind of power and discretion which inheres in a fiduciary relation and not that illimitable potentiality which an unrestrained individual possesses respecting his own property; a soundness of judgment which follows from a due appreciation of trust responsibility, unless the settlor has expressed an intention that the power of discretion conferred is such that the court will not interfere except upon clear proof, that the trustees are abusing their authority and acting in perversion of the trust.

Dumaine v. Dumaine, 16 N.E.2d 625, 629 (Mass. 1938) (internal quotation marks and citations omitted). Given the degree of discretion bestowed upon the trustees by the Trust Document, this court should not interfere here, where there has been no showing of abuse of authority or actions undertaken in perversion of the trust.

B. The Motion for Separation and to Dismiss

Julie Sprague contends, without citation to authority other than the general equitable powers of this court, that she is entitled to separation of one-third of the corpus of the 1962 Trust to be set aside to her and her descendants and that, after such separation, she and her descendants are entitled to dismissal as parties to this action. She is entitled to this relief, she asserts, because she should not be "needlessly subjected" to this legal battle between her brother and sister, and because the

defendant trustees are "inherently conflicted and unqualified to act as trustees for all three of the Sprague children."[4] Motion for Separation from the 1962 Trust of the 1/3 Per Stirpital [sic] Interest of Julie Sprague and Her Descendants and Motion to Dismiss as to Julie Sprague and Her Descendants (Docket No. 46) at 1.

The presence of Julie Sprague as a party to this lawsuit is required by Fed. R. Civ. P. 19(a).[5] It is not the proper role of the court to protect her from the decision of her brother to bring suit concerning the trust of which they are both among the beneficiaries. Julie Sprague may choose not to participate in the action, but she is not entitled to extraordinary relief in order to prevent others from making her a party to this or any other litigation.

In addition, division of the corpus of the 1962 Trust into two pieces is fundamentally inconsistent with the intent of the trust, which was created as a single entity and provides that the trustees

> may in their uncontrolled discretion at any time or times and for any reason pay any part or all of the net income of the trust to any one or more of the following persons living from time to time, payments to more than one person to be made in such proportions among them as the Trustees see fit:

---

[4] Julie Sprague refers throughout her submissions in connection with this motion to the three children of the settlor as if they were the only current beneficiaries of the 1962 Trust. However, the trust document makes clear that the beneficiaries at the time the 1962 Trust was created were Jeannette Hume Sprague and the issue of the marriage of the settlor and Jeannette Hume Sprague. Trust Document at P0323, Paragraph Second. It is clear from the numerous filings in this action that the issue of that marriage currently include at least several grandchildren in addition to Julie Sprague and her brother and sister.

[5] The rule provides, in pertinent part: "A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if . . . (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may . . . (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of the claimed interest."

> the Donor's wife . . . and each of the issue of the marriage of the Donor to his wife JEANNETTE.

Trust Document at P0323, Paragraph Second. Accomplishment of this purpose would be frustrated if a discrete portion of the trust assets were set aside to only some of the issue of the marriage. The provision of the Trust Document for *per stirpes* distribution does not come into effect until 21 years after the death of the last of the settlor's children. *Id*. at P0324, Paragraph Fourth. *See also* Restatement (Second) of Trusts § 333 and comments (1959) (stating grounds for reformation of trust, none of which are present in this case).

Julie Sprague refines her second argument to state: "It does not matter who the trustees are. No trustee can impartially represent the interests of all three of [the] children [of the settlor]." Reply of Julie Sprague to the Responses of the Trustees and Guardian Ad Litem (Docket No. 55) at 3. The logical conclusion of this argument is that no trust can ever have more than one beneficiary, since any trustee cannot "impartially" represent the interests of more than one beneficiary.[6] Merely to state the conclusion demonstrates the fallacy of the position. No citation to authority is necessary to dispose of this argument.

In the absence of any division of the trust corpus, there is no basis for Julie Sprague's motion to dismiss. I recommend that it be denied.

IV. Conclusion

[6] It would seem also that Julie Sprague, to be consistent, would have to take the position that no trustee could impartially serve the one-third interest in the corpus of the 1962 Trust that she asks the court to set aside to her and her descendants, since the interests of one or more of her descendants might at any given time differ from hers.

For the foregoing reasons, I recommend that the defendants' motion for partial summary judgment be **GRANTED** and that the motion of Julie Sprague to separate and to dismiss be **DENIED.**

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 12th day of August, 1998.

_____

David M. Cohen
United States Magistrate Judge